SUPREME COURT OF NOVA SCOTIA
Citation: *MacMillan v. MacMillan*, 2016 NSSC 361

Date: 2016-10-19
Docket: PtH No. 335261
Registry: Port Hawkesbury

Between:

Ronald J. MacMillan and Gary MacMillan

Plaintiffs

v.

Norman MacMillan

Defendant

COST DECISION

Judge:	The Honourable Justice Patrick J. Murray
Heard:	By written submissions received May 30, 2016 and May 31, 2016
Cost Decision:	October 19, 2016
Counsel:	Michelle Kelly for the Plaintiffs Harold MacIsaac, for the Defendant

By the Court:

Introduction

[1] This is a decision on costs following an eight day trial, under the *Partition Act* of Nova Scotia. My written decision in this matter was rendered April 10, 2013.

[2] On April 24, 2014 the Court issued an order with the following three provisions:

> 1. That the Plaintiffs are entitled to a 3/5 interest (to be allotted to them in common) in the property in issue known as PID's 50012707 and 50147826 ("the Property") and the Defendant a 2/5 interest in this Property;
>
> 2. That the Property be partitioned pursuant to Section 17 of the *Partition Act*;
>
> 3. And that the Court will make such further order(s) as it deems appropriate to conclude and finalize its decision and the partitioning of the Property as provided for or required by the *Partition Act*.

[3] By further order of the Court issued on April 24, 2014, three Commissioners were appointed. As referred to in my decision, they held the desired background and qualifications namely, Real Estate Appraiser, Nova Scotia Land Surveyor, and a member of the Nova Scotia Barristers' Society.

[4] The Commissioners recommended that the land be partitioned with the Plaintiffs receiving Parcels A & B and the Defendant receiving Parcels C & D, as shown on the plan marked Schedule "C" to their report. In short, the property was divided on a 60 - 40 basis respectively between the Plaintiffs and the Defendant.

[5] This Court decided that the prudent course of action was to accept the Report of the Commissioners filed May 26, 2015, together with the supplemental reports submitted by them in response to the questions of counsel and the Court.

Background

[6] The MacMillan family had farmed their land for about 150 years. It was large parcel consisting of 400 acres.

[7] The parties to this litigation are descendants of the late John and Flora MacMillan. They had five children, Ronald was one of them, Angus was another.

[8] Before his death, John wanted to deed the entire land to Angus, who stayed home and primarily cared for his parents. Angus refused to allow his father to deed the land to him because he thought it would not be fair to his other siblings.

[9] Flora, John and Angus are now all deceased. The Plaintiff, Ronald MacMillan, and his family owned a 3/5 or 60 % interest in the land. The Defendant, Norman MacMillan, son of Angus owned a 2/5 or 40% interest in the land at the time of the trial in this matter.

[10] The Plaintiffs commenced legal action, seeking to have the land "set off" to them alone. In return they sought to pay the Defendant a sum agreed upon by the Court for his interest.

[11] In the alternative the Plaintiffs sought to have the land sold, with them having the opportunity to submit a bid for the property.

[12] The Defendant sought a division of the 400 acres on the ground. In the many settlement offers put forth by him, the Defendant very often offered to the Plaintiffs the dwelling and cleared land, along with the amenities such as septic, well and outbuildings.

[13] This is a longstanding matter. The action was commenced in 2010, and there were discussions prior to that time. The first offer of settlement for example, made by the Defendant was dated October 6, 2009.

[14] The Plaintiffs have submitted a letter dated July 19, 2012 pointing out they were not willing to discuss settlement after July 20, 2012 and would be moving forward to trial.

[15] The parties sought different remedies at trial. They hold different views on whether costs should be awarded.

Position of Parties - Costs

[16] The Plaintiffs argue costs should not be awarded. Rather each party should each bear its own costs. The Plaintiffs say there were mixed results. Neither party got what they were seeking. Neither party sought the appointment of Commissioners to divide the land.

[17] The Defendant submits he is entitled to costs, because: i) costs follow the cause; ii) he was largely successful; iii) numerous offers to settle made by him; and iv) while not identical, the final outcome is close to what the Commissioners decided.

[18] In addition to the eight days of trial there was a view taken. There were also many pre and post-trial conferences held to finalize orders, appoint the Commissioners, have them sworn, explain their mandate, and provide an opportunity for input buy the parties.

[19] The Commissioners themselves sought directions. The Court consulted counsel on each occasion. Once the report was received, it was necessary for the Court to consider the report and make a decision to adopt it. Many issues arose out of the report and these were argued. All of these things involved substantial time and effort on the part of the Court, the parties and their counsel.

[20] Secondly, the trial and related proceedings were governed by an *Act* of the legislature, the *Partition Act*, R.S., c. 333, s. 1. This is an *Act* which respects ownership and the right of a party to retain their ownership in the land. Only if the land cannot be divided without causing prejudice should the land be sold. In other words, sale of the land should be a last resort.

[21] The *Partition Act* contains its own provision with respect to the costs. Section 47 states that costs shall be in the discretion of the trial judge as follows:

> **Costs**
>
> 47 (1) The costs of the trial of any issues or the costs of any contested matter shall be in the discretion of the judge.
>
> (2) All the other costs of the proceedings and the expenses and charges of the commissioners shall be taxed in the usual manner, and shall be paid by the parties in proportion to their respective shares or interests in the premises. *R.S., c. 333, s. 47.*

[22] The *Act* further authorizes compensation for improvements. Indeed, this was an issue that was argued and decided at trial.

Application of Civil Procedure Rules

[23] *Rule 2.01* states that the *Civil Procedure Rules* apply to all proceedings in the Supreme Court of Nova Scotia. *Rule 94.01* states that the *Rules* shall be interpreted in accordance with the rules for interpreting legislation, as contained in the *Interpretation Act*, R.S., c. 235, s. 1.

[24] It is my view that *Rule 77* on Costs applies to these proceedings. Attached as **Appendix "A"** is a summary of the principles contained in *Rule 77*.

Issues:

1. Should costs be awarded to the Defendant, as claimed by him?
2. If costs are awarded, what is an appropriate amount?

Analysis:

Issue # 1 – Should costs be awarded?

[25] On April 24, 2014, the Court issued an order that the costs of the trial on any issue or the costs of any contested matter shall be in the discretion of the judge. The order stated that all other costs and expenses of the proceedings shall be paid by the parties in proportion to their interests.

[26] This basic premise that costs are in the trial judge's discretion was discussed in ***Force Construction Ltd. v. Campbell***, 2008 NSSC 310, where he refused to order costs. Justice Coady stated the discretion is one to be exercised according to the circumstances of each case, and that the principle of indemnity is a paramount consideration.

[27] Further in ***Force Construction***, Justice Coady referred to a party's conduct before and during the litigation as well as the degrees of success achieved as being relevant to the exercise of the Court's discretion as to costs.

[28] At paragraph 170 of the trial decision, I referred to what the parties pleaded. I relied upon the fundamental rule of fairness in determining which proposal would best accommodate the "compelling and divergent interests".

[29] At paragraphs 158-163 I rejected what had been proposed by the Plaintiffs, stating I was not satisfied that a sale of the land was necessary or that the land could not be divided without prejudice to the parties.

[30] I found given that each side wished to retain ownership, that the fairest way to effect partition was to appoint Commissioners.

[31] I do not concur with the Plaintiffs' position that the Court ordered a different result than was sought by either party. Under sections 17 and 18 of the *Partition Act*, while it is permissive, the appointment of Commissioners by the Court is the suggested method to ensure an equitable division. This is consistent with what the Defendant sought at trial.

[32] At paragraphs 162 and 163 of the decision, the Court held:

> [162] The Plaintiff has provided no plan for a sharing of the land "on the ground". The Defendant has provided a proposed division on the ground, with alternatives.
>
> [163] In my view the willingness of the Defendant to be flexible is conducive to referring the matter to commissioners under the Act. It will be for them to determine whether partition can be made and whether any set off is necessary to compensate one party or the other for any specific part of greater value.

[33] At trial there was no expert evidence from a surveyor to assist the Court in making a division. With acreage of this size, a division without a surveyor's input would certainly not have been practical and likely not possible. Other Commissioners, such as the appraiser were needed to value the property (with set off if necessary), having regard to topography, cleared areas, ocean views, buildings and so on. It is also apparent that the report could not be pieced together without the benefit of legal counsel, as the third Commissioner.

[34] The Plaintiffs' position on costs is that there was shared success. There was in terms of the Plaintiffs retaining the dwellings, cleared land, ocean views and virtually all the amenities. That position in my view is too simplistic.

[35] The Court concurred with the basic position of the Defendant, that the land should be divided, thus the appointment of the Commissioners to effect partition.

[36] In the end, the Commissioners Report also adopted in large measure the proposal of the Defendant, both in terms of its theme and configuration.

[37] The Plaintiffs further argued that that the cost provision in s. 47 only "contemplates a further trial of any issue or contested matter – not a trial that pre-dates the appointment of Commissioners".

[38] With respect, I do not concur with this interpretation. The costs of the trial means just what it says. The Plaintiffs wanted the land sold to them or sold outright. The Defendant wanted the land divided. These positions were litigated at trial and dealt with in the decision.

[39] Under section 47(2) certain costs are to be shared by the parties in proportion to their respective interests are costs. These include those expenses that are necessarily shared to effect the partition ordered. For example, survey costs.

[40] It may be that some portion of the costs incurred after a trial should be borne by each side, because at that point the issues are no longer in contest.

[41] In the present case, however, the differences continued on many issues right up to the Court's acceptance of the report.

[42] For these reasons and exercising the discretion afforded to me under the *Act*, I find that the Defendant is entitled to costs. I turn now to consider the amount of costs that are payable to the Defendant.

Issue # 2 – What amount of costs is appropriate?

[43] This proceeding was time consuming and required attention to detail. It was also complex for several reasons: i) there was disagreement about how the substantial acreage would be divided, or could be divided; ii) the past difficulties over shared use made for some ill will; iii) the land's topography was an issue; iv) the concentration of the improvements, buildings and amenities in one location; and v) the large amount of wooded acreage and road frontage. The right mix of land and land value had to be achieved, on an unequal basis, 60 - 40 %.

[44] *Rule 77* provides various approaches in determining the "amount involved" under these tariff. Where the matter is substantially a non-monetary nature, *Rule 77 clause (c)(located just above Tariff A),* states the Court should consider the complexity and importance as factors relevant to that determination.

[45] The land was of great importance to both sides, as reflected by their positions at trial and their significant contribution to its improvement. I have discussed the complexity of division but it was also necessary to determine whether or not it could be divided without prejudice to the parties.

[46] Simply applying the factors as in *Rule 7.18 (c)* (complexity and importance) does not produce an automatic value for "amount involved". In ***Hines v. N.S.***

Registry of Motor Vehicles, [1990] 99 N.S.R. (2nd) 167, the applicant successfully challenged regulations under the *Motor Vehicle Act*. It was held that this was a non-monetary issue and consequently no effort should be made to find a monetary or financial basis upon which to determine costs.

[47] In ***Landymore v. Hardy***, [1992] 112 NSR (2d) 410, the action involved title to property worth approximately $210,000. In this case Justice Saunders stated:

> To give meaning to the words "a substantial contribution" I must select an amount involved that would, even on a basic level of scale 3, provide a sizable contribution to those fees of approximately $31,000.

[48] In reaching his decision, Justice Saunders further stated:

> I have selected an amount involved of $350,000 for all of the reasons previously discussed including the value of the property at risk, the importance of the many issues litigated and the complexity of the case.

[49] The "amount involved" under *Rule 77* for Tariff A purposes is referring to the amount involved in the litigation. In plain terms this means "what is at stake", what is at risk, what is it that stands to be gained or lost by the commencement and defending the action. It is the amount involved that should determine the costs and fees, if reasonable approaches to the amount involve produce a just result.

[50] The Defendant has suggested a number of ways that "amount involved" can be determined on these facts. The most obvious way is to use the value assigned to the land by accredited appraisers, since the entire dispute involved the land.

[51] The underlying principle is that the costs received should represent a substantial contribution toward a successful party's reasonable fees and expenses in claiming or defending a proceeding.

[52] In the present case the Plaintiffs submit that the Defendant has been fully successful in defence and substantially successful in his counterclaim.

[53] The Plaintiffs argue the Court should exercise its discretion not to award costs, given the limited success of each party. The Plaintiffs submit a review of the settlement offers is important. I concur.

[54] I have found that the Defendant was largely successful and that costs should be awarded. The settlement offers that were made also support the awarding of

costs to the Defendant. The offers however, are more relevant to the cost issue. Under *Rule 77.07* a written offer of settlement, whether made formally under *Rule 10* settlement or otherwise, is listed as a factor in determining whether the tariff be should increased or decreased.

[55] I have considered the offers made by the Defendant and the Plaintiffs. I am not going to review in detail each one, but generally it may be said that the Defendant's efforts to settle were substantial. Between the period of October 16, 2009 and September 17, 2012, the Defendant made approximately a dozen offers. Of these several were formal offers and consisted of two or three parts.

[56] A review of the Defendant's offers further shows that some were close to or in the range of the final outcome. For example, the September 17, 2012 offer would see the Defendant take 340 acres (the reverse of what he offered), and allow the Plaintiffs 60 acres, plus the land east and west of driveway. The Plaintiffs faired only marginally better in the outcome, receiving an additional 8.7 acres.

[57] I have considered the various ways of determining the amount involved under the Tariff for non-monetary matters as outlined in the Defendant's brief as well as the use of lump sum, and percentage of solicitor client fees.

[58] I have also considered the submissions of the Plaintiffs in their brief of May 31, 2016. There are some strong arguments contained therein. To their credit the Plaintiffs acknowledge that the Defendant's offer of September 17, "comes close to what the Commissioners found", while stating it was not the same makeup or size. At that point the Plaintiffs say they had already invested the time and cost of preparing for trial.

[59] By its very nature, an action under the *Partition Act*, raises the prospect of an uncertain outcome, except that the owners do not "lose" their interest as such. They do stand to lose the land, but not compensation for the value of their land.

[60] I cannot agree with the Defendant therefore that the amount involved was the total appraised amount, and that the Defendant could have lost everything. I think there is a strong argument that the amount involved is the value of the land, but for the Defendant the amount involved is 2/5 or 40 percent of land or land value. Unlike ***Hines*** the value of the land and its various attributes and deficiencies was an issue that was front and centre in the present case.

[61] Applying the Ship's Harbour appraisal value, which I accepted at trial, the amount involved for the Defendant would be $97,200.00.

[62] I refer to the case law that provides a rule of thumb of $15,000, now $20,000 per day of trial as one method of determining the amount involved. When one looks at these amounts the sum of $65,000 for legal fees is a reasonable fee, especially when one considers the significant amount of additional time involved outside of court time.

[63] I agree with Murphy, J. in ***GE Canada Equipment Financing G.P. v. 3068485 Nova Scotia Ltd.***, 2010 NSSC 204, that the Court should not embrace fully the actual legal fees but weigh and factor them into determining a just and proper cost amount. I agree with Moir, J. in ***Founders Square Ltd. v. Nova Scotia (Attorney General)***, 2000 NSSC 70, that the automatic use of percentages should be avoided, at or least discouraged.

[64] The ultimate question for the Court is as stated by Fichaud, JA in ***Armoyan v. Armoyan***, 2013 NSCA 136 (CanLII), as follows: " The Court's overall mandate, under *Rule 77.02(1)*, is to do justice between the parties."

[65] While the Defendant's legal interest has a monetary value of $97,200 based on the appraisal, his actual interest in the land is probably higher. The Defendant's attachment to the land and evidence of his grandfather's wish, makes his interest difficult to measure. The Plaintiffs also hold a strong attachment to the land.

[66] The Defendant is claiming a contribution of $38,875 toward actual legal costs of $65,000. A higher figure for legal fees would still be considered reasonable in my view. For argument sake, the amount claimed represents about 60 percent of costs claimed to actual fees.

[67] I find the amount involved here to be between $97,200 and $125,000. For cost purposes, this places the Defendant's interest in the $90,000 - $125,000 range under the tariff. This would yield a cost figure of $12,250 plus $16,000 in total for each day of trial for a total of $ $28,250.

[68] Instead of 60 percent of actual fees, the tariff amount would represent 45 percent of the fees, if one accepts the value of the Defendant's interest as the amount involved.

[69] Unlike ***Landymore***, I decline to increase the amount involved, in a substantial way, beyond the land value. I have however factored in complexity and importance in the final determination.

[70] Some restraint I think is called for given the nature of the proceeding. I agree that the Defendant tried mightily to settle the matter and that the Plaintiffs being "ready to go" was not conducive to settlement. Perhaps further, albeit last minute efforts may have resulted in settlement, thus avoiding the cost of a trial.

[71] On the other hand, a party is under no obligation to settle and at some point must prepare for the trial. That requires focusing on the trial. The Plaintiffs gave notice of this to the Defendant.

[72] The Plaintiffs made a serious offer to divide the land equally with a set off amount for the dwelling of $25,000. The Defendant received substantially more acreage in the final outcome 330 acres compared to 200 acres, but with no set off. A 50 percent offer on the land itself was 10 percent more than the Defendant's entitlement of 40.

[73] Finally, a division of this nature is something upon which reasonable people can disagree. Perhaps the state of the relationship contributed to the inability to settle. Notwithstanding, the Defendant is to be commended for his many efforts.

[74] Exercising the discretion afforded to me I find the figure of $30,000 to be a substantial contribution to the Defendant's legal costs in these circumstances.

[75] This is a figure rounded up from the Basic Scale (2) based on $97,200 - $125,000 as the amount involved. The increase, though modest reflects the Defendant's settlement efforts as per *Rule 77.07(2)(b)*. There is as well the half day taken for the view of the property.

[76] The Defendant asked that the Court consider whether any of the offers qualified under *Rule 10* for an increase in costs. I have considered *Rule 10* and while the offers come close the Defendants did not receive a "favourable judgment" as defined by the *Rule*. As noted however the offers were considered under *Rule 77.02(b)*.

Disbursements

[77] I have reviewed the disbursements claimed in the amount of $2,410.77 and the accompanying invoices. There are no invoices for things that were not

necessary. I am of the view that the amounts are reasonable. For example, there are two invoices for the Ship's Harbour appraisal, but each reflects different work, and the total of these, I would suggest, is well within the cost for a professional appraisal with court time.

[78] With respect to those few disbursements that have no invoices, there are four in number. Two are under $100.00 being $14.75 for postage and color copies of $26.00. The total cost for Xerox ($155.00) and $74.76 for courier for a trial of this length is modest. There is absolutely no reason to question these amounts incurred by the Defendant's counsel, as verified in his affidavit under oath at paragraph 4.

Conclusion

[79] The Defendant, Norman MacMillan, is hereby awarded costs in the amount of $30,000 plus the disbursements claimed for a total of $32,410.77.

Murray, J.

Appendix "A"

Cost Principles under Civil procedure Rule 77.

The following principles may be taken from *Rule 77 on Costs.*

(i) Costs are in the general discretion of the presiding judge. (*Rule 77.02(1));*

(ii) There is no limit on that discretion except for under *Rule 10,* a formal offer to settle. (*Rule 77.02(2));*

(iii) A judge may order one party to pay the costs of another.

(Rule 77.03(1));

(iv) Most commonly, party-party costs are awarded by which one party compensates another party for "part" of the compensated parties' expenses of litigation. *(Rule 77.01(a));*

(v) Costs normally follow the result, meaning the successful party is usually awarded costs. *(Rule 77.03)* For a successful party not to receive costs, there must be a very good reason.

(vi) The main test is that a judge may grant any Order about costs that will "do justice" between the parties. *(Rule 77.02(1));*

(vii) Party-party costs, unless a judge otherwise orders, shall be fixed in accordance with the Tariff of costs and fees, produced at the end of *Rule 77. (Rule 77.06(1));*

(viii) A judge may add or subtract to the Tariff amount in fixing costs. *(Rule 77.07(1));*

(ix) Some factors which may be relevant to increase or decrease the amount of the Tariff, include the amount claimed in relation to the amount recovered, the conduct of a party affecting the speed or expense of the proceeding, or an improper step taken in a proceeding. *(Rule 77.07(1);*

(x) Costs awarded are intended to be substantial but incomplete indemnity for the successful party;

(xi) The Tariff should not be departed from lightly;

(xii) *Rule 77* provides that the Tariff shall be bases on the "amount involved". In this regard it distinguishes between a monetary claim and non-monetary claim as follows.

(xiii) A judge may award a lump sum instead of Tariff costs.